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No. 90-348

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

NEW ERA PUBLICATIONS INTERNATIONAL, ApS,

Petitioner,

—v.—

CAROL PUBLISHING GROUP,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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17

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	3
CONCLUSION	14

TABLE OF AUTHORITIES

Pages

Cases:

Consumers Union v. General Signal Corp., 724 F.2d 1044 (2d Cir. 1983)... 11

Harper & Row v. Nation Enterprises, 471 U.S. 539 (1985) 4,6,7 12,13

Maxtone-Graham v. Burtchaell, 803 F.2d 1253 (2d Cir. 1986), cert. denied 481 U.S. 1059 (1987) 11

New Era Publications International v. Henry Holt & Co., 873 F.2d 576 (2d Cir. 1989), reh'g en banc denied 884 F.2d 660 (1989), cert. denied --- U.S. ---, 110 S.Ct. 1168 (1990) 4,12

Salinger v. Random House, 811 F.2d 90 (2d Cir.), cert. denied 494 U.S. 890 (1987) 4,12

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STATEMENT OF THE CASE

This case involves the application of the fair use provision of the Copyright Act of 1976, 17 U.S.C. § 107, to material in a book published by Respondent.

The book, A Piece of Blue Sky, is a critical biography of the late L. Ron Hubbard, founder of the controversial Church of Scientology. Hubbard was a prolific author. He published nearly 600 fiction and non-fiction works in his lifetime, 111 of which are in print (4a).[1]

At issue in the case are 103 passages taken from 47 different works.[2] All the passages have been previously published by Petitioner, the copyright owner.

The book quotes only a "miniscule amount" from 25 of the 47 works, 5-6% of 12 other works, and 8% or more of 10 works which, with two exceptions, are only 1-3 pages long (14a).[3] The book contains ap-

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[1] References to "__a" are to the Appendix to the Petition for Certiorari. References to "JA __" are to the Joint Appendix filed in the court below.

[2] There were originally 121 passages from 48 different works, but the District Court held and the Court of Appeals affirmed that the copyright of one work containing 18 passages has expired (20a-21a, 26a-27a). The Petition for Certiorari does not challenge that holding.

[3] The length of and the amount of material used from each work is tabulated at JA 106-09.

proximately 147,700 words, of which 4,323, or less than 2.7%, are taken from Petitioner's copyrighted works (15a).

REASONS FOR DENYING THE WRIT

The fair use provision of the Copyright Act is Congress' acknowledgement that scholarship, biography, criticism and journalism require the right to draw to some reasonable extent upon copyrighted works. If there were no such right, the nature of literature about figures and events that affect the course of public life would suffer great harm, commentary, criticism, history and reportage would be seriously impaired, and our nation's commitment to free discourse on matters of public importance would be endangered.

There is no question but that the book at bar serves the purposes intended to be protected by the fair use doctrine, as well as the broader purposes that are related to the interests of the First Amendment. It is a biography of the founder of a controversial social movement, which has a significant following; it draws upon some of Hubbard's published

works to illustrate concretely one or another criticism of Hubbard and the Church;[4] and the portions used in relation to each of the 47 works range from miniscule to insignificant. In addition, all of the allegedly infringing material has been previously published, which is a critical element in the decisional process in a fair use case. Harper & Row v. Nation Enterprises, 471 U.S. 539 (1985), Salinger v. Random House, 811 F.2d 90 (2d Cir. 1987), cert. denied, 484 U.S. 890 (1987) and New Era Publications v. Henry Holt & Co., 873 F.2d 576 (2d Cir. 1989), petition for rehearing and for rehearing en banc denied, 884 F.2d 659 (1989), cert. denied, --- U.S. --- (1990).

The Second Circuit opinion below correctly interprets the specific terms of the fair use provision, and serves the public interests protected by the provision. On the other hand, Petitioner's arguments in support of certiorari are, as we demonstrate, based upon an unreliable reading of the decision below and an at-

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[4] The record includes specific explanations by the author for his use of each of the 103 passages (JA 98-104).

tempt to ignore the critical fact that the case at bar involves previously published material exclusively.

Notwithstanding Petitioner's claims, there is no conflict between the Circuits, there is no conflict with decisions of this Court, there is no departure from the accepted and usual course of judicial proceedings, and there is no unsettled question to be decided by this Court.

1. Petitioner's related points 1 and 2 claim that "the court below established a new, expansive standard for the copying of published works which conflicts with and presumably purports to overrule prior law" (Petition, p. 14), and that its decision "creates widely disparate standards for the permissible copying of published and unpublished works" (id. at 16-17). The essence of Petitioner's claim is that the opinion below authorized "wholesale copying" of its copyrighted works (id. at 15), resulting in the alleged disparate standards.

First, there is no "wholesale copying." As pointed out above, the quantity of material taken from the majority of the

47 works is "miniscule," and only a relatively small portion is taken from the other works. However, if it is said for argument's sake that the amount of copyrighted material is "substantial," that standard has been explicitly authorized by this Court's decision in Harper & Row v. Nation Enterprises, supra at 564: "substantial quotations might qualify as fair use in a review of a published work...."

Second, there is no merit to Petitioner's claim that the Second Circuit established a new, expansive and disparate standard for the copyright of published works. It made no new law respecting the quantity of previously published material to be allowed as fair use. Rather, it distinguished the case at bar from this Court's decision in Harper & Row, which announced a narrow quantitative standard only with respect to previously unpublished material. Referring to the quantity of copyrighted material used in the book at bar, the Second Circuit said: "In the context of quotation from published works, where a greater amount of copying is allowed, see Harper & Row, 471 U.S. at

564, this is not so much as to be unfair" (14a).

There is indeed a disparate quantitative standard as between the use of published and unpublished material, but it is a standard announced by this Court in Harper & Row, not a new standard announced by the Second Circuit.

2. Petitioner's claim number 3 is twofold. It asserts that the court below, in considering statutory factor number three, which requires assessment of "the amount and substantiality of the portion used in relation to the copyrighted work as a whole," erroneously failed to consider "the percentage the copyrighted material constituted of the infringing book" (Petition, p. 17), and erroneously measured "the taking ... against the total number of words in copyrighted works from which any copying has been made... (id. at 18). Neither assertion has any merit.

First, as the court below pointed out, "section 107 plainly commands us to consider 'the amount and substantiality of the portion used in relation to the copy-

<u>righted work</u> as a whole'" (16a) (emphasis in original). The statutory language could not be more clear.

Petitioner's second point is factually incorrect. The opinion did not consider the volume of material taken against the total number of words quoted from the 47 works. It explicitly considered the amount taken from each individual work. Its conclusion that "the book uses overall a small percentage of Hubbard's works" (14a), is immediately followed by reference to the amount of materials taken from each of the 48 Hubbard works.

3. Petitioner's claim number 4 asserts that the decision below "changes a crucial aspect of the fair use doctrine by permitting the publication of entirely expressive passages on the grounds that most of the other claimed infringing passages cannot be so characterized" (Petition, p. 20). First, the Second Circuit said no such thing. Second, the assertion itself reflects a fundamental misunderstanding of the law of copyright.

The distinction drawn by the Second Circuit was between "factual" works and

"non-factual" works, stating that "the scope of fair use was greater with respect to the former (11a). The Petitioner's misrepresentation of the opinion's language implies that the correct distinction to be drawn in fair use analysis is between "factual" material and "expressive" material. That is Petitioner's fundamental misunderstanding of copyright law and of the fair use doctrine.

Since copyright law protects only an author's form of expression -- contrasted to the author's ideas or facts contained in the work -- the very purpose of the fair use provision is to provide an exception to the protection of forms of expression, under the circumstances contemplated by the fair use provision. The only reason that this case is in court is because the book contains 103 passages taken verbatim from Hubbard's works, that is, it takes Hubbard's forms of expression. Thus, the analysis, correctly understood by the court below, is not between "factual" and "expressive" material at all, for all of the passages consist of expressive material. The only point being made by the Circuit in the passage misconstrued

by the Petitioner is that, on the spectrum that lies between the expression of pure fact and the expression of pure non-fact, e.g., poetry, the tendency of the fair use decisions is to be more permissive as to the former end of the spectrum than the latter. We don't quarrel with that generality. We do quarrel with Petitioner's erroneous implication that non-factual material, which it calls "expressive" or "creative," is wholly beyond the fair use provision. The opinion below of course said no such thing, and Petitioner's reliance on its misrepresentation as a ground for granting certiorari is falacious.

4. Petitioner asserts in its point number 5 that the Second Circuit's analysis of the market factor "creates new law, making it virtually impossible for the holder of copyrighted works to demonstrate economic injury from copyright of published works." It rests that claim on an "implication" that the court held that "there is no longer any market value to protect once a work has been published" (Petition, p. 20). The Second Circuit's opinion is not that simple-minded.

Rather, it says that material already published does not have the same untapped economic value of unpublished material that might be included in a future work by the copyright holder (19a).

In any case, that particular point is only a tertiary consideration in the opinion below. Much more significant is its holding that it is totally speculative whether use of a small amount of copyrighted material in an unfavorable context will encourage or discourage purchase of a yet unpublished work; and that, even if the effect could be said to discourage purchasers, where the copyrighted work and the critical work "serve 'fundamentally different functions,'" factor No. 4 favors the critical work, relying on Maxtone-Graham v. Burtchaell, 803 F.2d 1253 (2d Cir. 1986), cert. denied 481 U.S. 1059 (1987), and Consumers Union v. General Signal Corp., 724 F.2d 1044 (2d Cir. 1983) (18a). Thus, the Second Circuit's conclusion regarding the market factor is not novel but rests on established precedent within the Circuit, and is not in conflict with any decision of this Court.

5. Petitioner is quite correct to point out that there has recently been considerable and sometimes controversial litigation concerning the fair use doctrine (Petition, pp. 12-13). But it neglects to point out that, without exception, the controversy has been over establishment of a new and different standard for testing the scope of the fair use provision as applied to previously unpublished material. See Harper & Row v. Nation Enterprises, supra; Salinger v. Random House, Inc., supra; New Era Publications International v. Henry Holt & Co., supra. There has been no dispute at all over the fair use doctrine as applied to previously published material. Indeed, in New Era Publications International v. Henry Holt & Co., supra, perhaps the most controversial of the recent decisions, in addition to the unpublished passages which were the focus of the decision in the Second Circuit, there were also 69 passages of previously published material that were held protected as fair use with no controversy whatsoever. Judge Miner simply noted that the District Court had found those passages to be non-infringing

under the fair use provision, and made no further comment. 873 F.2d at 580.

The opinion of the Second Circuit in the case at bar is totally consistent with prior law on application of the fair use doctrine to previously published material. It is Petitioner's argument that one or another aspect of the decisions involving previously unpublished material should affect analysis involving previously published material as well. There is no basis for that claim except wishful thinking. This Court's opinion in Harper & Row v. Nation Enterprises, supra, at 564, was explicit in the distinctive fair use treatment to be given previously published material as compared to previously unpublished material.